Supreme Court, U.S.
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No. 031380

IN THE

Supreme Court of the United States

HERBERT L. BREWER, III,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Pro se Petitioner

QUESTION PRESENTED

The following question is presented by the petitioner:

I. May a federal tribunal recharacterize a 42 U.S.C. § 1983 petition for writ of error coram nobis as a 28 U.S.C. § 2254 petition filed after a prisoner has been released from custody in light of this Court's decision in *Castro v. United States,* 124 S.Ct. 786 (2003) decided December 15, 2003?

PARTIES BELOW

Petitioner Herbert L. Brewer, III, was the petitioner-appellant in the court below. Respondent State of Mississippi was the respondent-appellee in the court below.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED. i

PARTIES BELOW ii

TABLE OF AUTHORITIES. iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 6

REASONS FOR GRANTING THE WRIT 8

I. A FEDERAL TRIBUNAL MAY NOT RECHARACTERIZE A 42 U.S.C. § 1983 PETITION FOR WRIT OF ERROR CORAM NOBIS AS A 28 U.S.C. § 2254 PETITION FILED AFTER A PRISONER HAS BEEN RELEASED FROM CUSTODY IN LIGHT OF THIS COURT'S DECISION IN *CASTRO v. UNITED STATES,* 124 S.Ct. 786 (2003) DECIDED DECEMBER 15, 2003. 8

CONCLUSION 11

APPENDIX 1a

TABLE OF AUTHORITIES

Cases Page

Adams v. Dept. of Juvenile Justice of New York City,
142 F.3d 61, 65 (2nd Cir. 1998) 11

Castro v. United States,
540 U.S. 124 S.Ct. 786 (2003) ..... i, 8-11

Parker v. Fort Worth Police Department,
980 F.2d 1023 (5th Cir. 1993) 8

Statutes

Title 28 U.S.C. § 2254 ..... i, 3-5

Title 42 U.S.C. § 1983 ..... i, 2, 8

Miss. Code Ann. of 1972 § 97-37-23 ..... 6, 7

Other Authorities

Black's Law Dictionary, 5th edition, p. 179 7

IN THE

Supreme Court of the United States

No. _____

HERBERT L. BREWER, III,

Petitioner,

v.

STATE OF MISSISSIPPI,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

Herbert L. Brewer, III, on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit, filed on January 12, 2004. There was no good-faith determination of the law in petitioner's case in either the district court or the Fifth Circuit Court of Appeals.

OPINIONS BELOW

The Court of Appeals' denial of petition for panel rehearing and petition for rehearing en banc of January 12,

2004 is reproduced at la-2a of the Appendix to this certiorari petition (hereafter "Pet. App."). The unreported Court of Appeals' Opinion affirming the district court of October 21, 2003 is reproduced at Pet. App 3a-4a. The unreported District Court Final Judgment of March 26, 2003 is reproduced at Pet. App. 5a-6a. The United States Magistrate's Report and Recommendation of October 24, 2002 is reproduced at Pet. App 7a-9a.

JURISDICTIONAL STATEMENT

The Court of Appeals' final judgment was entered on January 12, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves 42 U.S.C. § 1983, 28 U.S.C. § 2254, and the application of this Court's decision in *Castro v. United States*, 124 S.Ct. 786 (2003).

42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. § 2254:

> (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> (b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that -
>
> > (A) the applicant has exhausted the remedies available in the courts of the State; or
> >
> > (B)(i) there is an absence of available State corrective process; or
> >
> > > (ii) circumstances exist that render such process ineffective to protect the rights of the applicant.
>
> (2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.
>
> (3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.
>
> (c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.
>
> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any

claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim -

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that -

(A) the claim relies on -

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

STATEMENT OF THE CASE

Petitioner was convicted in the Circuit Court of Lee County, Mississippi of unlawful possession of explosives under the Miss. Code Ann. of 1972 § 97-37-23 and sentenced to four years in the Mississippi Department of Corrections. A timely appeal was filed in the Mississippi Supreme Court in 1994. In 1995 this case was sent down to the new Court of Appeals. On September 17, 1996 the Mississippi Court of Appeals upheld that conviction by a five-to-five (5-5) split vote.

Petitioner's attorney then for the second time petitioned the Mississippi Supreme Court for certiorari. Certiorari was granted for two issues on March 13, 1997. The Mississippi Supreme Court affirmed the judgment of the lower court "without discussion as to Issue I" with 5 concurring and 3 dissenting on Justice Smith's opinion for the court on September 25, 1997. Rehearing was denied on December 4, 1997.

I.e., there was a dissent among jurists of reason.

The most glaring problem with this case is that, according to the testimony had and received, Petitioner Herbert L. Brewer, III, was factually innocent of the charge.

Note the questioning of Bobby Parker on page 96, lines 23-26, of the trial transcript:

> Q. Did you pay him anything?
>
> A. No, I didn't. He wanted me to, but I refused to pay him. I didn't know there was going to be any charge when he was doing it.

The statute on which the petitioner was convicted, § 97-37-23, plainly exempts those engaged in lawful business. Unfortunately for the petitioner, the trial judge substituted his

opinion throughout the trial of what a lawful business is for the plain dictionary definition.

> **Business.** Enterprise in which person engaged shows a willingness to invest time and capital on future outcome. *Doggett v. Burnet,* 62 App. D.C. 103, 65 F.2d 191, 194.
>
> *Black's Law Dictionary,* 5th edition, page 179.

In order to invoke the business exception to § 97-37-23(1) there are registration requirements mandated in § 97-37-23(3)(b):

> (3) In order to invoke the exception provided in subsection (1) for persons who possess explosive articles for business purposes, such person must comply with the provisions of this subsection as follows:
>
> (a) One or more individuals shall be designated by the owner of a business employing explosive articles subject to this section as the custodian for such articles; and
>
> (b) The custodian shall notify the sheriff of any county wherein such articles are utilized or employed by registering with the sheriff in writing prior to such use and including in such registration:

The problem here is that there was no way for petitioner to comply with this section of the statute as the sheriff refused to keep such records, as the trial transcript accurately reflects.

I.e., petitioner's conduct did not fit within the statute.

The district court recharacterized petitioner's petition for writ of error coram nobis under 42 U.S.C. § 1983 to one under 28 U.S.C. § 2254 and dismissed the action. This recharacterization of petitioner's petition for writ of error coram nobis was then upheld by the Fifth Circuit Court of Appeals on October 21, 2003.

A petition for rehearing and rehearing en banc was denied on January 12, 2004.

The decision of this Court in *Castro v. United States*, 124 S.Ct. 786 (2003) was issued on December 15, 2003. At *no time* did the federal courts of the Fifth Circuit address the *Castro* decision or, for that matter, the Fifth Circuit's own decision in *Parker v. Fort Worth Police Department*, 980 F.2d 1023 (5th Cir. 1993).

At all times (from the filing of his 42 U.S.C. § 1983 petition for writ of error coram nobis forward to the present) petitioner Herbert L. Brewer, III, was *not in custody*.

REASON FOR GRANTING THE WRIT

I. A federal tribunal may not recharacterize a 42 U.S.C. § 1983 Petition for Writ of Error Coram Nobis as a 28 U.S.C. § 2254 Petition filed after a prisoner has been released from custody in light of this Court's decision in *Castro v. United States*, 124 S.Ct. 786 (2003) decided December 15, 2003.

This Court's holding in *Castro v. United States*, 540 U.S. 124 S.Ct. 786 (2003) is quite clear:

> Federal courts sometimes will ignore the legal label that a *pro se* litigant attaches to a motion and recharacterize the motion in order to place it within a different legal category. See, *e.g., Raineri v. United States*, 233 F.3d 96, 100 (CA1 2000); *United States v. Detrich*, 940 F.2d 37, 38 (CA2 1991); *United States v. Miller*, 197 F.3d 644, 648 (CA3 1999); *Raines v. United States*, 423 F.2d 526, 528, n. 1 (CA4 1970); *United States v. Santora*, 711 F.2d 41, 42 (CA5 1983); *United States v. McDowell*, 305 F.2d 12, 14 (CA6 1962); *Henderson v. United States*, 264 F.3d 709, 711 (CA7 2001); *McIntyre v. United States*, 508 F.2d 403, n. 1 (CA8 1975) *(per curiam); United States v. Eatinger*, 902 F.2d 1383, 1385 (CA9 1990) *(per curiam); United States v. Kelly*,

> 235 F.3d 1238, 1242 (CA10 2000); *United States v. Jordan,* 915 F.2d 622, 625 (CA11 1990); *United States v. Tindle,* 522 F.2d 689, 693 (CADC 1975) *(per curiam).* **They may do so in order to avoid an unnecessary dismissal, *e.g., id.,* at 692-693, to avoid inappropriately stringent application of formal labeling requirements, see *Haines v. Kerner,* 404 U.S. 519, 520 (1972) *(per curiam),* or to create a better correspondence between the substance of a *pro se* motion's claim and its underlying legal basis. See *Hughes v. Rowe,* 449 U. S. 5, 10 (1980) *(per curiam); Andrews v. United States,* 373 U. S. 334 (1963).**
>
> *Id.,* slip op. at 5-6.

Unfortunately for this petitioner, what is emphasized by the bold type in this section of *Castro* is a polar opposite of what he actually experienced.

Justice Scalia's concurring opinion, with whom Justice Thomas joined, further highlights the problems petitioner encountered in the courts below.

> I write separately because I disagree with the Court's laissez-faire attitude toward recharacterization. The Court promulgates a new procedure to be followed if the district court desires the recharacterized motion to count against the *pro se* litigant as a first 28 U. S. C. § 2255 motion in later litigation. (This procedure, by the way, can be ignored with impunity by a court bent upon aiding *pro se* litigants at all costs; the only consequence will be that the litigants' later § 2255 submissions cannot be deemed "second or successive.") The Court does not, however, place any limits on when recharacterization may occur, but to the contrary treats it as a routine practice which may be employed "to avoid an unnecessary dismissal," "to avoid inappropriately stringent application of formal labeling requirements," or "to create a better correspondence between the substance of a *pro se* motion's claim and

its underlying legal basis." Ante, at 6. The Court does not address whether Castro's motion filed under Federal Rule of Criminal Procedure 33 should have been recharacterized, and its discussion scrupulously avoids placing any limits on the circumstances in which district courts are permitted to recharacterize. That is particularly regrettable since the Court's new recharacterization procedure does not include an option for the *pro se* litigant to insist that the district court rule on his motion as filed; and gives scant indication of what might be a meritorious ground for contesting the recharacterization on appeal.

In my view, this approach gives too little regard to the exceptional nature of recharacterization within an adversarial system, and neglects the harm that may be caused *pro se* litigants even when courts do comply with the Court's newly minted procedure. The practice of judicial recharacterization of *pro se* litigants' motions is a mutation of the principle that the allegations of a *pro se* litigant's complaint are to be held "to less stringent standards than formal pleadings drafted by lawyers." *Haines v. Kerner,* 404 U. S. 519, 520 (1972) *(per curiam).* "Liberal construction" of *pro se* pleadings is merely an embellishment of the notice-pleading standard set forth in the Federal Rules of Civil Procedure, and thus is consistent with the general principle of American jurisprudence that "the party who brings a suit is master to decide what law he will rely upon." *The Fair v. Kohler Die & Specialty Co.,* 228 U.S. 22, 25 (1913). Our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief.

Recharacterization is unlike "liberal construction," in that it requires a court deliberately to override the *pro se* litigant's choice of procedural vehicle for his claim. It is thus a paternalistic judicial exception to the

> principle of party self-determination, born of the belief that the "parties know better" assumption does not hold true for *pro se* prisoner litigants.
>
> I am frankly not enamored of any departure from our traditional adversarial principles. It is not the job of a federal court to create a "better correspondence" between the substance of a claim and its underlying procedural basis. But if departure from traditional adversarial principles is to be allowed, it should certainly not occur in any situation where there is a risk that the patronized litigant will be harmed rather than assisted by the court's intervention. It is not just a matter of whether the litigant is more likely, or even much more likely, to be helped rather than harmed. For the overriding rule of judicial intervention must be "First, do no harm." The injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of producing *prejudice* through the court's intervention.
>
> *Id,* slip op., Scalia, J., concurring, at 1-3.

Here, the petitioner did not make a mistake; the lower courts did.

The lower courts are bound by Supreme Court precedent. *Adams v. Dept. of Juvenile Justice of New York City,* 142 F.3d 61, 65 (2nd Cir. 1998).

CONCLUSION

For the reason set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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POST OFFICE BOX 514
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(901) 270-7420
Pro se petitioner

Dated: March _____, 2004

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60364

HERBERT L. BREWER, III
Plaintiff - Appellant

versus

STATE OF MISSISSIPPI
Defendant - Appellee

Appeal from the United States District Court
for the Northern District of Mississippi
USDC No. 1:02-CV-314-B-D

Filed January 12, 2004

ON PETITION FOR REHEARING EN BANC

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges.

Treating the petition for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rule of Appellate Procedure and Local Rule 35), the petition for

Rehearing En Banc is DENIED.

FOR THE COURT:

*/s/*E Grady Jolly

UNITED STATES CIRCUIT JUDGE

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 03-60364
Conference Calendar

D.C. Docket No. 1: 02-CV-314

HERBERT L. BREWER, III
Plaintiff - Appellant
v.
STATE OF MISSISSIPPI
Defendant - Appellee

Appeal from the United States District Court for the
Northern District of Mississippi, Aberdeen

Filed October 21, 2003

Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

OPINION

Before KING, Chief Judge, and JOLLY and STEWART, Circuit Judges.

Per curiam

Herbert L. Brewer, III, appeals the dismissal of his 42 U.S.C. § 1983 complaint, which the district court construed as a successive 28 U.S.C. § 2254 petition. The district court did not err in construing Brewer's complaint as a 28 U.S.C. § 2254 petition as Brewer's claims clearly challenged his possession-of explosives conviction. *Preiser v. Rodriguez,* 411 U.S. 475, 500 (1973).

However, as Brewer was no longer in custody at the time that he filed his petition, the district court lacked jurisdiction to consider the petition, and the denial of the petition is affirmed on that basis. *See Maleng v. Cook,* 490 U.S. 488, 492 (1989); *United States v. Early,* 27 F.3d 140, 142 (5th Cir. 1994).

Brewer argues that he was entitled to the district court's "chamber papers" and that the court failed to give adequate consideration to his claims. A review of the magistrate judge's report reflects a conscientious consideration of Brewer's claims, and his assertion that the district court failed to give adequate attention to his claims is simply unsupported. The judgment of the district court is AFFIRMED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. 1:02-CV-314-B-D

HERBERT L. BREWER, III
Petitioner

versus

STATE OF MISSISSIPPI, ET AL.
Respondents

Filed March 26, 2003

FINAL JUDGMENT

Upon consideration of the file and records in this action, including the Report and Recommendation of the United States Magistrate Judge dated October 24, 2002, and the October 31, 2002, objections to the Report and Recommendation, the court finds that the petitioner's objections are without merit and that the Magistrate Judge's Report and Recommendation should be approved and adopted as the opinion of the court. It is, therefore

ORDERED:

1. That the Report and Recommendation of the United States Magistrate Judge dated October 24, 2002, is hereby approved and adopted as the opinion of the court.

2. That all of the petitioner's claims are hereby **DISMISSED** with prejudice.

THIS, the 25 day of March, 2003.

/s/Neal Biggers

NEAL B. BIGGERS
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

Civil Action No. 1:02-CV-314-B-D

HERBERT L. BREWER, III
Petitioner

VS.

STATE OF MISSISSIPPI
Respondent

Filed October 24, 2002

REPORT AND RECOMMENDATION

Petitioner Herbert L. Brewer, III, has filed a pleading in this case styled "Petition for Writ of Error Coram Nobis" proclaiming he is "factually innocent of a crime of which he was convicted by a Mississippi state court." He invokes the jurisdiction of the court pursuant to 42 U.S.C. § 1983 and 28 U.S.C. §§ 2201 and 2202, and asks the court to set aside his conviction.

On June 6, 1993, Brewer was convicted of possession of explosives in the Circuit Court of Lee County, Mississippi, for which he was sentenced to serve four years in the custody of the Mississippi Department of Corrections. He appealed

his conviction to the Mississippi Court of Appeals, which affirmed his conviction on September 17, 1996.

Brewer filed an "Emergency Petition for Rehearing for Writ of Certiorari and Motion to Compel in the Name of Justice." Upon rehearing, the Mississippi Supreme Court affirmed the conviction. Brewer then unsuccessfully filed a petition for writ of habeas corpus in this court (1:97CV421-B-D). Brewer was finally discharged from the Mississippi Department of Corrections upon expiration of sentence on May 26, 1998.

Two factors bar this petition. First, "there is no jurisdiction in a federal district court to entertain a petition of *coram nobis* with respect to challenged state convictions." *See Tavares v. Massachusetts,* 59 F.Supp.2d 152, 154-155 (D.Mass. 1999), and the numerous cases cited therein.

Second, although Brewer argues that he has evoked the jurisdiction of the court under § 1983, he has failed to state a claim under that statute. Section 1983 is a tort action. Petitioner rather argues the validity of his conviction, a 28 U.S.C. § 2254 issue. As a § 2254 action, it is barred as a second or successive petition, pursuant to Rule 9(b) of the Rules Governing Section 2254 Cases in the United States District Courts.

Accordingly, it is recommended that this petition be denied and dismissed with prejudice.

The parties are referred to 28 U.S.C. § 636(b)(1) and Local Rule 72.2(D) for the appropriate procedure in the event any party desires to file objections to these findings and recommendations. Objections are required to be in writing and must be filed within ten days of this date. Failure to file written objections to the proposed finding and recommendations contained in this report within ten days from the date of filing will bar an aggrieved party from challenging on appeal both the proposed factual findings and the proposed legal conclusions accepted by the district court.

Douglas v. United States Automobile Association, 79 F.3d 1415 (5th Cir. 1996).

Petitioner is directed to acknowledge receipt of this report and recommendation by signing the enclosed acknowledgment form and returning it to the court within ten days of this date. Because of the misuse of the court's postage-paid envelopes, these envelopes are no longer provided. Petitioner is warned that failure to comply with the requirements of this paragraph may lead to the dismissal of this lawsuit under F.R.Civ.P. 41(b) for failure to prosecute and for failure to comply with an order of the court.

Respectfully submitted, this 23rd day of October, 2002.

*/s/*Jerry A. Davis

UNITED STATES MAGISTRATE JUDGE